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The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)

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The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)[†]

SYMEON C. SYMEONIDES*

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I. INTRODUCTION

Two years ago, at the 1997 Annual Meeting of the Association of American Law Schools ("AALS") Conflicts Section, we gathered in a similar forum to celebrate, or to lament, the silver anniversary of the *Restatement (Second) of Conflict of Laws* ("*Second Restatement*").¹ During that gathering, I had the audacity to suggest that it is time to begin the process of preparing for a third conflicts restatement.² Now I have the burden of defending that suggestion in front of a knowledgeable and, for this reason, extremely skeptical audience.³

Before doing so, I would like to clarify what I am and what I am not advocating. First, regarding the time frame, I am not suggesting that we should have a new restatement *now*. Rather I am suggesting that we should begin the process of preparing for a new restatement. The preparation for and drafting of the *Second Restatement* lasted almost two decades, with the first draft published in 1953 and the final text promulgated in 1969. I envision a process that will last at least as long and which will be at least as open, allowing ample opportunity for considering all viewpoints, including those that oppose a new restatement. I hope that by the end of that process many of those who now believe that a new restatement is premature may decide to reconsider their views.

Second, my main preoccupation is with choice of law. It seems to me that the *Second Restatement's* rules on jurisdiction are dispensable since this subject is governed primarily by federal law and secondarily by state statutory law. Federal law is also preeminent in the area of recognition of sister-state judgments. As for recognition of foreign-country judgments, the *Second Restatement* is simply inadequate. Its only section on the matter⁴ does not do justice to the complexity of the subject matter. Both the *Restatement (Third) of the Foreign Relations Law of the*

1. See Symposium, *The Silver Anniversary of the Second Conflicts Restatement*, 56 MD. L. REV. 1193 (1997). The articles therein were authored by Patrick J. Borchers, William L. Reynolds, William M. Richman, Symeon C. Symeonides, Louise Weinberg, and Russell J. Weintraub.

2. See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997). "I submit that the next natural step is to begin the process of preparing for a third conflicts restatement." *Id.* at 1280.

3. This is a revised version of a talk delivered at the 1999 Annual Meeting of the AALS Conflicts Section. This explains the use, uncharacteristic for this author, of the first person singular.

4. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) [hereinafter SECOND RESTATEMENT]. This section states laconically that "[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States." *Id.* The brevity of this section is explained by the fact that the *Second Restatement* subscribes to the proposition that, by and large, the same principles that govern recognition of sister-state judgments should govern recognition of foreign-country judgments. See, e.g., *id.* § 98 cmt. b. "In most respects," foreign judgments that are valid under section 92 (which provides for sister-state judgments) "will be accorded the same degree of recognition to which sister State judgments are entitled . . . because the public interest requires that there be an end of litigation." *Id.* However, neither the practicality nor the soundness of this proposition are self-evident. See SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 860-66, 889-91 (1998).

*United States*⁵ and the Uniform Foreign Money-Judgments Recognition Act⁶ have done much better in this regard, and the drafters of a third restatement of conflicts would benefit by considering both of these documents. On the other hand, if the draft convention on jurisdiction and judgment recognition which is currently under discussion at The Hague⁷ is agreed upon and if it is ever ratified by the United States Senate, then this subject too could be dropped from a future restatement. Thus, if a new restatement is needed, it is primarily in the choice-of-law area.⁸

Third, regarding choice of law, I am not, of course, advocating a return to the rules of the *Restatement of the Law of Conflict of Laws* ("First Restatement")⁹ nor the adoption of new inexorable black-letter rules. What I am advocating is a new restatement which will: (a) address the problems that have emerged since the drafting of the *Second Restatement*; (b) abandon, reduce the scope of, or significantly alter the few but broad black-letter rules of the *Second Restatement*; and (c) replace the *Second Restatement*'s "nonrules" with more concrete and less equivocal principles of conflicts resolution.¹⁰

II. WHY A NEW RESTATEMENT?

In my 1997 article, I provided an assessment of the judicial acceptance of the *Second Restatement*, indicating that as of that time a plurality of 21 jurisdictions followed the *Second Restatement* in tort conflicts and 25 jurisdictions did so in contract conflicts.¹¹ These numbers remain the same to date.¹² My listing contained important caveats, such as that in many instances the courts' loyalty to the *Second Restatement* is rather shallow or equivocal, that their application of it often tends to be manipulative or disingenuous, etc.¹³ I also explained that some of the reasons for which the *Second Restatement* has such a high following are not entirely compli-

5. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-486 (1986).

6. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962), 13 U.L.A. 261 (Supp. 1999). This Act has been adopted by 30 jurisdictions.

7. See Symposium, *Could a Treaty Trump Supreme Court Jurisdictional Doctrine*, 61 ALB. L. REV. 1159 (1998); Symposium, *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOK. J. INT'L L. 1 (1998); Symposium, *The Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 1 (1994).

8. For different conclusions regarding jurisdiction and recognition of judgments, see William M. Richman & William L. Reynolds, *Prolegomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 418-19 (2000).

9. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

10. Part III of this Article contains my tentative suggestions for tort conflicts.

11. See Symeonides, *supra* note 2, at 1265-69, and cases cited therein. In addition, the *Second Restatement* is followed by many federal courts in federal question cases. See *id.* at 1269 n.148. Furthermore, three jurisdictions follow the kindred approach of "significant contacts" in torts and five do so in contract conflicts. See *id.* at 1266.

12. See Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 329 (1999).

13. See Symeonides, *supra* note 2, at 1261-63; see also EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* § 2.19 (3d ed. 2000).

mentary to it.¹⁴ Despite these caveats and qualifications, however, the fact remains that the *Second Restatement* dominates the American conflicts landscape.

One may justifiably wonder, therefore, why a *Restatement* that has such a high judicial following should be replaced by another restatement. A short and cynical answer to this question is that this high following simply means that the *Second Restatement* has prevailed over the competing methodologies. However, to prevail is one thing, to succeed is another. Thus, one could argue that the *Second Restatement's* prevalence is nothing but a race down to the lower common denominator, and that this movement should be reversed.

A longer, less cynical answer encompasses reasons that can be grouped into two categories—what the *Second Restatement* is, and what the *Second Restatement* has done. This is the answer that I have chosen to explore.

A. What the Second Restatement Has Done

Beginning with the latter point, it is somewhat ironic that one of the reasons for which we should be talking about a new restatement is because the *Second Restatement* has managed to occupy center stage in contemporary American conflicts law. If this is success, then the *Second Restatement* is the victim of its own success. Indeed, if the *Second Restatement* had no following today, if it had remained what its early critics thought it was, namely a mere aspirational prestatement of what conflicts law ought to be, we would not be talking about replacing it today. The reason we should be talking about this today is precisely because the restatement has succeeded in attracting enough judicial following that it cannot be dismissed as irrelevant and because, as explained below, it is far from a flawless document.

The *Second Restatement* has gradually managed to accomplish two things: (a) encourage courts to abandon the traditional approach of the *First Restatement*,¹⁵ and (b) discourage courts from following other alternative choice-of-law methodologies such as those of Brainerd Currie or Robert Lefflar. For better or worse, the result is that a clear plurality and perhaps a majority of American courts purport to follow the *Second Restatement*, whether or not they do so faithfully or knowledgeably. If the *Second Restatement* were a perfect, complete, and current document and was simply misunderstood by the courts, then our efforts should be directed toward correcting the courts rather than the *Second Restatement*. But it seems that the *Second Restatement* is none of the above. It is not complete, it is not current, and it is certainly not perfect.

14. See Symeonides, *supra* note 2, at 1269-77 (suggesting six reasons for the *Restatement's* popularity, namely that the *Second Restatement*: (1) provides the judge with virtually unlimited discretion; (2) does not require hard thinking (at least as applied by judges); (3) is not ideologically "loaded" in the sense that it does not contain built-in biases in favor of forum law or in favor of recovery, although it does provide excellent cover to rationalize existing biases and for accommodating just about any judicial ideology; (4) is a complete "system" in that it has something to say on most categories of conflicts cases; (5) carries the prestige of the American Law Institute; and (6) has "momentum").

15. See Symeonides, *supra* note 2, at 1277-78.

B. What the Second Restatement Is

1. The *Second Restatement* Is Dated

Indeed, the *Second Restatement* is obviously dated, and its age shows in at least two ways: (a) in that it is virtually silent on or inadequate for many of the conflicts which have been increasingly occupying American courts in the last two decades and which will continue to do so in the future; and (b) in that its few black-letter rules are increasingly becoming an anachronism today.

a. The *Second Restatement's* Gaps

The *Second Restatement* did a fairly good job in providing for conflicts that were common during and before the time of its drafting. The *Restatement* has plenty to say on conflicts arising out of traffic accidents, or involving guest statutes, intrafamily immunities, charitable immunities, and the like. But while some of these conflicts have almost disappeared in recent years, other types of conflicts have become much more common. I am not so much referring to the conflicts arising from the use of the internet which are just now beginning to emerge¹⁶ as I am referring to more traditional cases that are now being litigated day in and day out.

For example, during the last two decades, we have witnessed a virtual explosion in litigation involving disputes about insurance coverage for environmental pollution.¹⁷ These disputes are as complex as they are important. They involve multiple risks situated in multiple states. They also involve the interests of parties other than those bound by the insurance contract. The *Second Restatement* contains only one brief section on the whole subject of "fire, surety or casualty insurance."¹⁸ Section 193 provides a presumptive rule in favor of the law of the state of "the principal location of the insured risk."¹⁹ The very fact that this section speaks of a "risk" in the singular reveals only some of the problems encountered when that section is applied to the mega-conflicts arising in today's multisite and multistate disputes.²⁰

The *Second Restatement* is equally inadequate to handle the complex choice-of-law issues arising in many of the "mega torts" that have been the object of extended and protracted litigation during the last two decades. Among them are the asbestos cases, the agent orange cases, the DES cases, the breast implant cases, and the numerous

16. For a comprehensive and thoughtful exploration of these issues, see also Jane C. Ginsburg, *The Private International Law of Copyright in an Era of Technological Change*, 273 RECUEIL DES COURS 239 (1998); INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998).

17. See SYMEONIDES, PERDUE & VON MEHREN, *supra* note 4, at 346-47, 354-56; Symeonides, *supra* note 12, at 360-71.

18. SECOND RESTATEMENT, *supra* note 4, § 193.

19. *Id.*

20. The comments accompanying section 193 anticipate the possibility of an insurance contract covering multiple risks and suggest that each risk should be treated as if it were covered by a different contract. However, besides being merely a suggestion, this notion offers insufficient guidance for courts encountering the mega-conflicts described in the text.

cases arising from airplane disasters. The American Law Institute has recognized the need for choice-of-law rules for these cases and has proposed its *Complex Litigation Project*.²¹ However, the Project will apply only to cases that are consolidated for trial by federal courts under the Multidistrict Litigation Statute.²² Nothing has been done for nonconsolidated cases handled by federal or state courts.

In fact, the *Second Restatement* is inadequate even for single cases arising from products liability disputes or involving the issue of punitive damages. To be sure, one could argue that section 145 is as available for products liability conflicts as it is for other tort conflicts. But this is precisely the problem. Section 145 may be workable in guest-statute conflicts, but not in the more complicated and sui generis products liability conflicts. Similarly, one could argue that section 171 which applies to "damages" in general also applies to punitive damages in particular.²³ But, again, this is precisely the problem. Punitive damages involve different policies than compensatory damages. The former are designed to punish and deter tortfeasors, whereas the latter are designed to repair the harm by compensating the victim. A choice-of-law rule that is focused on the domicile of the parties as section 171 seems to be²⁴ may be sound for compensatory damages but not for punitive damages.

A new restatement will provide an opportunity for assessing the accumulated experience in conflicts involving the above cases and issues and extracting from it choice-of-law guidelines that are more focused than those provided by the *Second Restatement*.

b. The *Second Restatement's* Black-Letter Rules

The *Second Restatement's* age is also evident in its black-letter rules. These rules are few in number but vast in scope. Not surprisingly, most of them are found in the area the *Second Restatement* calls "Property"²⁵—which includes successions and marital property—and particularly in the part dealing with land.²⁶ These rules restate the traditional dogma by assigning to the law of the situs of the land²⁷ virtually *all*

21. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994); Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 833 (1994).

22. 28 U.S.C. § 1407 (1994).

23. SECOND RESTATEMENT, *supra* note 4, § 171 cmt. d (providing that this section applies to "exemplary damages").

24. Like many other sections in the *Second Restatement's* chapter on "Wrongs," section 171 is not self-executing but simply refers to the "law selected by application of the rule of § 145" as the law that will determine the measure of damages. However, the comments accompanying section 171 suggest that the parties' common domicile is likely to be the state of the most significant relationship. See *id.*

25. *Id.* §§ 222-266.

26. See *id.* §§ 222-243. For other black-letter rules, see *id.* §§ 245-255 (*inter vivos* transactions involving movables); §§ 260-265 (succession to movables). For other unilateral choice-of-law rules, see *id.* § 285 (divorce); *id.* § 286 (nullity of marriage); *id.* § 289 (adoption).

27. The applicable law is almost invariably the "law that would be applied by the courts of the situs." *Id.* §§ 223, 225-232, 236, 239-242. The above quoted phrase is often accompanied by the prediction that these courts will "usually" apply their own law.

questions involving inter vivos conveyances,²⁸ marital property,²⁹ and intestate,³⁰ or testate³¹ succession.

This adherence to tradition might have been understandable in the 1960s, but it has now become an impediment to progress. Today no sound policy reason can be offered for inexorably subjecting *all issues* involving land to the law of the situs. While the situs state has a legitimate interest in matters of land utilization and issues involving clarity and security of title, it has no interest in controlling issues such as the capacity of the disposer, the capacity or worthiness of an heir or legatee, the interests of the surviving or non-owning spouse, the order of succession, or the formal validity of a will or a transaction involving land.³² The time for debunking the "situs taboo" is simply long overdue, and a new restatement can provide the opportunity for so doing.³³

2. The *Second Restatement* Is a Transitional Document

The *Second Restatement* was drafted during a period of transition from an inflexible territorialist approach to flexible policy-based approaches.³⁴ Its drafting began in 1953 and was completed in 1969. As its chief drafter Willis Reese acknowledged, it was intended to be "a transitional work."³⁵ It was "written during a time of turmoil and crisis . . . when rival theories were being fiercely debated, and when serious doubt was

28. See *id.* § 223 (subjecting to situs law all issues affecting validity of conveyance, including issues of capacity and formal sufficiency).

29. See *id.* § 234 (providing that situs law determines the effect of marriage upon land owned by a spouse at the time of marriage or acquired during marriage).

30. See *id.* § 236 (subjecting to situs law all issues of intestate succession to land); *id.* § 237 (addressing legitimacy as affecting succession); *id.* § 238 (addressing adoption as affecting succession).

31. See *id.* § 239 (addressing validity and effect of will); *id.* §§ 241-242 (addressing interest of surviving spouse).

32. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 460 (3d ed. 1986).

[T]he situs qua situs, with rare exceptions, has an interest in applying its own law . . . only when choice of law will affect use of the land. Even when land use is affected, . . . the situs rule should probably yield to the conflicting rule of another state that has a genuine interest in validating a transaction that the situs would invalidate.

Id.; see also MOFFATT HANCOCK, STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES 293-390 (1984); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 15-17 (1963); Symeon C. Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029, 1052-54, 1062-64, 1090-97 (1987).

33. For a proposal to this effect, see Richman & Reynolds, *supra* note 8, at 424-26.

34. See *id.* at 417 ("Attempting to 'restate' the law of choice of law in 1971 was analogous to trying to write a history of World War II during the Battle of Stalingrad."); see also GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 189 (1997); Symeonides, *supra* note 2, at 1277-80.

35. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983).

expressed about the practicality, and indeed the desirability, of having any rules at all."³⁶ Although Reese believed that "the formulation of rules should be as much an objective in choice of law as it is in other areas of law,"³⁷ Reese also knew that at that time tort and contract conflicts were not yet ripe for such rules.³⁸ This is why in these two areas the *Second Restatement* attempted no more than to "provide formulations that were . . . broad enough to permit further development in the law."³⁹ Reese retained the firm hope, however, that in due time these formulations would permit the development of "more definite"⁴⁰ or "precise"⁴¹ choice-of-law rules.

Reese's views on the transitional nature of the *Second Restatement* were shared by Robert A. Leflar, another legend of American conflicts law and also one of the drafters of the *Second Restatement's* chapter on torts. Leflar acknowledged that, although the *Second Restatement* was "forward looking"⁴² and was "firm[ly] dedicat[ed] to continuous growth,"⁴³ the *Second Restatement* did not state the law of the future. He said: "[The Restatement] does not state the law of 1980 and we may have to wait until after 1980 to see what that law is to be. . . . Wherever it leaves us, we go on from there."⁴⁴

Well, we are "there" now. The *Second Restatement* has accomplished its tasks of facilitating the break from the traditional theory and the opening of new ways of thinking. But the *Second Restatement* has not attempted and thus could not succeed in consolidating the lessons learned during this transitional period. This should be the task of the new restatement.

3. The *Second Restatement* Is Too Equivocal (The *Second Restatement's* Nonrules)

The *Restatement's* transitional nature is primarily evident in its exceedingly equivocal semi-prescriptions or "non-rules"⁴⁵ for tort conflicts and contract conflicts. Indeed, for these conflicts the *Restatement* does little more than suggest some presumptive or displaceable rules which tentatively identify the state of the applicable

36. *Id.* at 518-19.

37. Willis L.M. Reese, *General Course on Private International Law*, 150 RECUEIL DES COURS 1, 61 (1976).

38. See Reese, *supra* note 35, at 518.

39. *Id.* at 519.

40. *Id.* at 518 (stating that torts and contract conflicts were not as yet susceptible to "hard and fast rules," but expressing the hope that "it will be possible to state more definite rules at some time in the future"); see also *id.* at 508.

41. Reese, *supra* note 37, at 62 (arguing that the conflicts experience since the revolution had "reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press on, however, beyond these principles to the development, as soon as our knowledge permits, of precise rules.").

42. Robert A. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 267 (1972).

43. *Id.* at 268.

44. *Id.* at 278.

45. Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 381 (1966).

law but authorize the court to apply the law of another state if the court determines that that state has a more significant relationship.⁴⁶ In many cases, the *Restatement* does not even go as far. It simply provides "pointers" telling us that a certain state will "usually" be the state whose law would apply.⁴⁷ In many more cases, however, even the word "usually" appeared too categorical to the *Restatement's* drafters. This explains why they decided that these cases should be handled under an entirely ad hoc approach, leaving the choice-of-law question to the court guided only by a non-exclusive, nonhierarchical list of the factual contacts to be "taken into account" in choosing the applicable law "under the principles of § 6."⁴⁸

The drafters' decision to take such an equivocal stance in tort and contract conflicts, although criticized at the time,⁴⁹ was clearly the right decision. Indeed, in light of the fluidity of the law at that time, black-letter rules would have been unwise if not disastrous. The flexible nonrules of the *Second Restatement* were supposed to free courts from the straightjacket of the *First Restatement* without replacing it with a new straightjacket. In that, the *Second Restatement* has succeeded. It has helped liberate the courts from the confines of the *First Restatement* without placing them under a different yoke.

At the same time, however, the *Second Restatement* has provided convenient cover for judicial subjectivism and loose impressionistic thinking of the type which might be acceptable in some of the social sciences but which should not be acceptable in

46. In the area of tort conflicts, the *Second Restatement* provides 10 sections designating the applicable law for 10 different types of torts. In all sections, the designation of the state with the most significant relationship is followed by this escape clause: "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied." This clause is one of the most repeated phrases in the entire *Restatement*. See, e.g., SECOND RESTATEMENT, *supra* note 4, §§ 146-151, 153-155, 175. In the area of contract conflicts, the "unless" clause appears in most of the sections devoted to particular contracts. See, e.g., *id.* §§ 189-193, 196.

47. For example, in the area of tort conflicts, 11 of the 19 sections devoted to specific tort issues conclude with the adage that "[t]he applicable law will usually be the local law of the state where the injury occurred." See *id.* § 156 (tortious character of conduct); *id.* § 157 (standard of care); *id.* § 158 (interest entitled to legal protection); *id.* § 159 (duty owed to plaintiff); *id.* § 160 (legal cause); *id.* § 162 (specific conditions of liability); *id.* § 164 (contributory fault); *id.* § 165 (assumption of risk); *id.* § 166 (imputed negligence); *id.* § 172 (joint torts). One section, section 169, provides that for intrafamily immunity the applicable law "will usually be the local law of the state of the parties' domicile." *Id.* § 169. Only the remaining seven sections are unaided by such a presumption. See *id.* §§ 161, 163, 168, 170-171, 173-174.

In contract conflicts, section 188 provides that, subject to some exceptions, "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." Similarly, section 198 provides that "[t]he capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile[.]" *id.* § 198, while section 199 provides that contractual "[f]ormalities which meet the requirements of the place where the parties execute the contract will usually be acceptable." *Id.* § 199. Similar language is found in many other sections of the *Second Restatement*.

48. E.g., *id.* § 145 (for torts); *id.* § 188 (for contracts).

49. See Ehrenzweig, *supra* note 45, at 381.

law. Three decades later, it is time to begin examining whether it is appropriate and feasible to attempt what Reese aspired for “more definite”⁵⁰ or “precise”⁵¹ or at least less equivocal choice-of-law rules. For what it is worth, my answer to both of these questions is affirmative and is explained *infra*.

C. The Need To Reorient American Conflicts Law

Although the need to articulate new rules is one of the main reasons for advocating a new restatement, it is not the only reason. Even people who are very skeptical about rules can find a good reason to support a new restatement, if: (a) they are unhappy with the current state and direction of American conflicts law; and (b) they are assured that a new restatement will provide the vehicle for redirecting the future of American conflicts law.

Point (a) is obviously a subjective matter. People who are happy with the status quo will find this whole debate unproductive and perhaps silly. However, for those who believe that the status quo leaves much to be desired, point (b) deserves some exploration. As the huge and perhaps unexpected success of the *Second Restatement* in influencing judicial opinion demonstrates—especially when compared to the rather slim judicial following of other alternative choice-of-law methodologies advanced by academic commentators—courts are much more likely to pay attention to a document that bears the imprimatur of the American Law Institute (“ALI”) than to any law review article, even one authored by an intellectual giant. The examples of David Cavers and Brainerd Currie, to mention only two giants who are no longer with us, are sufficient to make the point. If this is true, then a new restatement can provide an excellent vehicle through which academic opinion can help reorient the course of American conflicts law in the next century.

D. The Need for New Choice-of-Law Rules

Be that as it may, there is no denying that the need for a new restatement is more evident to those who believe in the desirability and feasibility of new choice-of-law rules. My own beliefs on this subject are known. I have, for example, criticized as excessive the “anti-rule syndrome” that in my opinion characterized American choice-of-law thinking during the first three decades following the conflicts revolution.⁵² I have supported the ALI’s Complex Litigation Project at the national level⁵³ and have advocated statutory rules at the state level.⁵⁴ I have also had the responsibility of

50. Reese, *supra* note 35, at 518.

51. Reese, *supra* note 37, at 62.

52. See Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. 813, 815-18 (Supp. 1994) [hereinafter Symeonides, *Exception Clauses*]; Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549, 550-52 (1985).

53. See Symeon C. Symeonides, *The ALI’s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843 (1994).

54. See, e.g., Symeon C. Symeonides, *Louisiana’s Draft on Successions and Marital Property*, 35 AM. J. COMP. L. 259, 285-90 (1987).

drafting such rules for two jurisdictions⁵⁵ and the good luck to see them in force in one of these jurisdictions.⁵⁶ For these reasons, I would not be surprised if some people attribute to me a bias in favor of rules.

Nonetheless, what I am advocating here is not statutory rules but rather *restatement rules*. Restatement rules differ from statutory—or even judicially established—rules in that they are nonbinding. If they are good, they will be adopted by courts. If they are bad, they will be ignored. There is even a third possibility—they can be adopted with modifications. Thus, restatement rules are essentially risk-free. Furthermore, what I am advocating are not the rigid rules of the old type but rather flexible rules with built-in escapes which will allow courts enough freedom to deviate in exceptional cases.⁵⁷

Subject to the above qualification, however, I do believe that some type of rules are necessary. I am glad that we have abandoned the rules of the *First Restatement*, I applaud the *Second Restatement*'s significant contribution to that effect, and I even applaud the *Second Restatement*'s content, given the time at which it was drafted. However, I am becoming increasingly disheartened by the current state of American conflicts law which, as one observer put it, "has become a tale of a thousand-and-one-cases"⁵⁸ in which "each case is decided as if it were unique and of first impression."⁵⁹ "Contradictory results in the case law, confusion, and also the 'homeward trend' have been the resulting consequences."⁶⁰

While these consequences were both predictable and understandable during the first years of the conflicts revolution, the question faced more than three decades later is whether this freewheeling experimentation, this "impressionnisme juridique,"⁶¹ or

55. For Louisiana, see Book IV of the Louisiana Civil Code, LA. CIV. CODE ANN. arts. 3515-3549 (West 1994) (enacted 1992) [hereinafter Louisiana codification]. This codification is discussed in, inter alia, Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 460 (1993); Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 223 (1992); Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective*, 38 AM. J. COMP. L. 431 (1990).

For Puerto Rico, see SYMEON C. SYMEONIDES & ARTHUR T. VON MEHREN, A PROJET FOR THE CODIFICATION OF PUERTO RICAN PRIVATE INTERNATIONAL LAW (P.R. Acad. Jurispr. Legisl. 1991). For discussion, see Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413 (1990).

56. See Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises"*, 54 LA. L. REV. 497 (1994).

57. For an example of such rules, see *infra* Part III.

58. P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability*, 46 OHIO ST. L.J. 569, 578 (1985).

59. *Id.* at 580.

60. SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, § 2.26.

61. Yvon Loussouarn, *Cours général de droit international privé*, 139 RECUEIL DES COURS 270, 338 (1973-II); see also Kurt H. Nadelmann, *Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. L. 1 (1976).

"judicial particularistic intuitionism"⁶² has gone on a bit too long, and whether American conflicts law needs and is ripe for some process of consolidation and standardization. I believe that the answer should be an affirmative one. To paraphrase Maurice Rosenberg, the "unruly reasonableness" brought about by the abandonment of the "unreasonable rules" of the traditional theory should be succeeded by a "principled reasonableness."⁶³ Courts need and are entitled to more guidance than either the *Second Restatement* or the iconoclastic literature of the last two decades have provided.⁶⁴ "Predictability in conflicts law is as important as it is in substantive law."⁶⁵ To recall Reese's statement once again, "the formulation of rules should be as much an objective in choice of law as it is in other areas of law."⁶⁶ Some form of rules

62. Kozyris, *supra* note 58, at 580.

63. Maurice Rosenberg, *Two Views on Kell v. Henderson An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967) ("The problem is to escape both horns of the dilemma by avoiding both unreasonable rules and an unruly reasonableness that is destructive of many of the values of law."); *see also* Kozyris, *supra* note 58, at 580.

[A]ny system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion. With centuries of experience and doctrinal elaboration behind us, we hardly need more lab testing and narrow findings. Rather, we need to make up our minds and make some sense out of the chaos.

Id.

64. *See* SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, § 2.26; *see also* DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 122 (1965).

[While] we may have to accept the articulated *ad hoc* decision as an interim substitute, . . . we should persevere in the search for rules or principles which would determine when the law of one state which served one purpose should be preferred to the law of another state which served a different purpose.

Id. at 122; *see also id.* at 108-13, 121-23; Peter Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1672 (1981); Kozyris, *supra* note 58, at 577-80; Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 319 (1972); Reese, *supra* note 35; Reese, *supra* note 37; Maurice Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 551, 644 (1968); Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981); Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 INT'L & COMP. L.Q. 121, 127 (1976); Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 35 (1981) ("We have not articulated a cogent, coherent, reasonably administrable conflicts methodology to whose banner all reasonable courts will rally."). For an impartial summary of the rules vs. approach debate, *see* SHREVE, *supra* note 34, at 243-53; *see also id.* at 227-28. For a comparative discussion, *see* SYMEON C. SYMEONIDES, *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS?* 21-35 (1999).

65. SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, § 2.26.

66. Reese, *supra* note 37, at 61.

are the vehicle for producing such predictability⁶⁷ and a new restatement is the best forum for debating and articulating these rules.

III. THE NEXT STEP: SOME TENTATIVE SUGGESTIONS

A. Let's Get To Work

Naturally, there will be many disagreements about the content and shape of these rules and of the new restatement in general. However, such disagreements are both inevitable and healthy. It is far preferable to air these disagreements in an open and frank debate than to sit around lamenting the current state of affairs. I believe that these disagreements can be resolved if we pay attention to the lessons derived from both the failure of the *First Restatement* and the proven inadequacies of the *Second Restatement*. The failure of the *First Restatement* teaches us that broad inflexible rules based on dogma rather than experience are bound to fail. The experience with the *Second Restatement* teaches us that courts do need more guidance than a mere laundry list of factors and contacts. Achieving the golden medium should be the aspiration of the drafters of the new restatement. Our task is simply to offer our suggestions.

Having initiated the debate for a new restatement, I feel obligated to provide my own suggestions. Militating against this obligation is the danger that any specific suggestions at this early point may detract from the focus of this preliminary debate in which the question is *whether* to have a new restatement, not what its content should be. Another danger is that proposals of specific rules for inclusion in the new restatement can be easily misunderstood as being motivated by a desire to promote the proposer's individual vision about the new restatement. On balance, however, these are risks and burdens that proponents of a new restatement should be willing to undertake.

Thus, with all the necessary trepidation and with keen awareness that such an undertaking may be vastly premature, I will attempt to carry my own burden of persuasion by advancing for purposes of discussion a few choice-of-law rules of the kind that I believe could be considered in drafting the new restatement's chapter on torts. By no means do I claim that these rules are perfect. Quite the contrary, they are as fallible as their proposer. My only purpose in proposing them is to hopefully demonstrate that it is feasible to construct a new breed of choice-of-law rules that reflect the lessons of the American conflicts experience from and since the conflicts revolution. While each of us may draw different lessons from this experience, I thought I should articulate my own lessons.

The Draft proposed below contains, in its operative part, four choice-of-law rules. The first two rules (those contained in sections 2 and 3 of the Draft, *infra*) are derived

67. See Kozyris, *supra* note 58, at 580.

[F]ixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression.

Id.

from actual cases and are defended on that basis, albeit with full recognition that cases going the other way are not lacking. The second two rules (those contained in section 4 on punitive damages and section 5 on products liability, respectively) are not derived from actual cases, although one might argue that they would lead to results that are consistent with the holdings of several cases. If this means that these rules are a prestatement rather than a restatement of the case law, so be it. After all the same was true with the *Second Restatement*.

B. A Modest Proposal for Tort Conflicts

§ 1. *GENERAL AND RESIDUAL PRINCIPLE.* Except as otherwise provided in this Chapter, the rights and liabilities of the parties with respect to an issue in tort are governed by the law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in [the *Second Restatement* § 6].

. . . [The rest of the *Second Restatement* § 145 follows] . . .

§ 2. *CONDUCT REGULATION.* Issues of conduct-regulation are governed by the law of the state in which the injurious conduct occurred.

However, if the resulting injury occurred in another state and its occurrence there was objectively foreseeable, the law of that state applies if the injured party requests its application.

§ 3. *LOSS DISTRIBUTION.* Issues of loss distribution arising from conduct that is wrongful under § 2 are governed, in the following order, by the law of:

(a) the state in which the injured party is domiciled if the tortfeasor is also domiciled in that state or in another state that provides a substantially identical remedy;

(b) the state in which either party is domiciled if both the injurious conduct and the resulting injury occurred in that state; or

(c) the state in which the injured party is domiciled if the injury predictably occurred there and the injured party requests application of that state's law.

In all other cases, the applicable law is to be determined under § 1.

§ 4. *PUNITIVE DAMAGES.* Punitive damages for conduct that is wrongful under § 2 may be awarded if any two of the following contacts are situated in a state or states that impose punitive damages for such conduct: (a) place of conduct; (b) place of injury; or (c) the tortfeasor's domicile.

§ 5. *PRODUCTS LIABILITY.*

1. *Victim's choice.* Liability and damages for injury caused by a product are governed by the law of the state chosen by the injured party, provided that that state has any two of the following contacts: (a) place of injury; (b) domicile of the injured party; (c) domicile of the defendant; (d) place of manufacture of the product; or (e) place of acquisition of the product. [For the purposes of this choice, contacts situated in different states whose law on the particular issue is substantially identical shall be treated as if situated in the same state.]

The injured party's choice shall be disregarded if the defendant's products were not available in the chosen state through ordinary commercial channels.

2. Defendant's choice. If the injured party is able but fails to make a choice under (1), the defendant may choose the law of a state that is both the place of injury and the domicile of the injured party.

3. Residual choice. Cases not disposed of under subsections (1) or (2) are to be governed by the law applicable under §§ 1-4.

§ 6. ESCAPE. When the application of the law designated by §§ 1-5 will produce a result that is clearly irreconcilable with the principles of [the Second Restatement] § 6, the court may take appropriate corrective measures or resolve the conflict under § 1.

C. Explanations

1. Coverage and Structure

Obviously, the above Draft is much briefer and far less comprehensive than the *Second Restatement's* chapter on torts. That chapter contains a total of thirty-six sections,⁶⁸ of which ten are devoted to particular torts (sections 146-55), nineteen to particular tort issues (sections 156-74), and six to issues arising in the wrongful death action (sections 175-80). Although the six sections of the Draft are phrased in sufficiently broad terms as to be capable of covering all the torts and issues covered by the *Second Restatement's* thirty-six sections, I am not suggesting that all of the latter sections are dispensable, although most of them are repetitive.⁶⁹ It may well be that some of the *Restatement's* sections, especially the ones on special torts such as defamation, should be retained and updated. Which sections fall within this category is a question better left to the drafters of the new restatement.

Another feature of the *Second Restatement* that is preserved by the above Draft is the presence of a general section (section 145)⁷⁰ followed by narrower sections applicable to particular torts (sections 146-55)⁷¹ or issues (sections 156-74).⁷² Proposed section 1 will perform the same function as section 145 of the *Second Restatement* in the sense that it will apply to all torts and issues unless displaced by another section applicable to a particular issue (sections 2-4) or to a particular tort (section 5). Thus, sections 2-4 will apply to issues of conduct regulation, loss distribution, and punitive damages, respectively that may arise in any tort action other than

68. See SECOND RESTATEMENT, *supra* note 4, §§ 145-180. Five additional sections are devoted to worker's compensation conflicts. See *id.* §§ 181-185.

69. For example, 11 of the 19 sections devoted to specific tort issues conclude with the adage that "[t]he applicable law will usually be the local law of the state where the injury occurred." See *id.* § 156 (tortious character of conduct); *id.* § 157 (standard of care); *id.* § 158 (interest entitled to legal protection); *id.* § 159 (duty owed to plaintiff); *id.* § 160 (legal cause); *id.* § 162 (specific conditions of liability); *id.* § 164 (contributory fault); *id.* § 165 (assumption of risk); *id.* § 166 (imputed negligence); *id.* § 172 (joint torts).

70. See *id.* § 145.

71. See *id.* §§ 146-155.

72. See *id.* §§ 156-174.

a products liability action. Conversely, section 5 will apply to all issues arising in a products liability conflict. Finally, section 1, the general section, will apply residually to all cases or issues not disposed of by sections 2-5.

The final text of section 1 should, of course, be such as to reflect the philosophy of the new restatement. For the sake of simplicity, however, Draft section 1 tracks the language of present section 145. What should be clear is that section 1 should have the same interrelationship with a general anchor-article as presently exists between section 145 and section 6 of the *Second Restatement*.

Finally, another feature of the *Second Restatement* that is retained by the above Draft is the presence of an escape clause. Indeed the need for an escape is too obvious to need any defense here.⁷³ The only difference is that rather than having one escape in each section as the *Second Restatement* does, the Draft provides a single escape from all sections.

2. The Distinction Between Conduct-Regulating Rules and Loss-Distribution Rules

The proposed Draft adopts the distinction between matters of conduct regulation, on the one hand, and matters of loss allocation or loss distribution, on the other. This distinction was enunciated in *Babcock v. Jackson*,⁷⁴ reaffirmed in *Schultz v. Boy Scouts of America*,⁷⁵ and received statutory sanction by the Louisiana codification.⁷⁶ In addition, it has been adopted either explicitly or implicitly by the case law in several other states.⁷⁷ Although it is often difficult to draw a precise line between the two categories,⁷⁸ this distinction is both necessary and useful in that it provides the

73. See Symeonides, *Exception Clauses*, *supra* note 52, at 813-14, 864-65, *passim*. For a comparative discussion, see SYMEONIDES, *supra* note 64, at 31-34.

74. 191 N.E.2d 279 (N.Y. 1963).

75. 480 N.E.2d 679 (N.Y. 1985); see also *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001 (N.Y. 1994).

76. See LA. CIV. CODE ANN. arts. 3543-3544 (West 1999), discussed in Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677 at 699-735 (1992).

77. See, e.g., *Matson v. Anctil*, 7 F. Supp. 2d 423 (D. Vt. 1998); *Matson by Kehoe v. Anctil*, 979 F. Supp. 1031 (D. Vt. 1997); *Bauer v. Club Med Sales, Inc.*, No. C-95-1637, 1996 WL 310076 (N.D. Cal. May 22, 1996); *Dorr v. Briggs*, 709 F. Supp. 1005 (D. Colo. 1989); *District of Columbia v. Coleman*, 667 A.2d 811 (D.C. 1995); *Rong Yao Zhou v. Jennifer Mall Restaurant*, 534 A.2d 1268 (D.C. 1987); *Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896 (Iowa 1996); *Collins v. Trius, Inc.*, 663 A.2d 570 (Me. 1995); *Moye v. Palma*, 622 A.2d 935 (N.J. Super. Ct. App. Div. 1993); *FCE Transp. Inc. v. Ajayem Lumber Midwest Corp.*, No. 87Ap-1146, 1988 WL 48018 (Ohio Ct. App. May 12, 1988); *Troxel v. A.I. duPont Inst.*, 636 A.2d 1179 (Pa. Super. Ct. 1994); *Myers v. Langlois*, 721 A.2d 129 (Vt. 1998); *Miller v. White*, 702 A.2d 392 (Vt. 1997); *Ellis v. Barto*, 918 P.2d 540 (Wash. Ct. App. 1996), *review denied*, 930 P.2d 1229 (Wash. 1997).

78. See Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches"*, 43 AM. J. COMP. L. 1, 17-18 (1995) (describing the difficulties encountered by New York courts) [hereinafter Symeonides, *A View "From the Trenches"*]; Symeonides, *supra* note 76, at 704-05 (acknowledging difficulties of this distinction under the Louisiana codification).

vehicle for attaining the necessary equilibrium between the two perennially competing principles: territoriality and personality of the laws. Indeed, to a large extent, the story of private international law can be described as a contest between these two grand principles, with the pendulum swinging from the one to the other principle in different periods in history. In this country, Joseph Beale had pulled the pendulum all the way towards territoriality, and then Brainerd Currie pulled it almost all the way back towards personality.⁷⁹ It is time to acknowledge that neither Beale nor Currie was entirely wrong or entirely right, and to attempt a new equilibrium between these two principles.

It seems logical to search for this equilibrium in the two fundamental objectives of the substantive law of torts—deterrence and compensation. The premises of this Draft are: (a) that a state's deterrence policy embodied in its conduct-regulating rules is implicated by all substandard conduct that occurs within or produces effects in its territory, regardless of whether the parties involved are domiciled in that state;⁸⁰ and (b) that a state's loss-distribution policy may or may not extend to nondomiciliaries acting within its territory, but does, in principle, extend to its domiciliaries even when they act outside that state.⁸¹ In other words, conduct-regulating rules are territorially oriented, whereas compensation and loss-distribution rules are usually not territorially oriented.

79. Cf. Letter from Alfred Hill to Symeon C. Symeonides (Nov. 17, 1998) (on file with the *Indiana Law Journal*). "[Beale's] Restatement . . . represented an attempted organization of virtually the entire subject in terms of territoriality—a project that was carried to ridiculous extremes. As for the model that Currie used to compared with this unreal system, it too was unreal." *Id.*

80. See *Babcock*, 191 N.E.2d at 284.

Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

Id.

81. See, e.g., *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685 (N.Y. 1985).

[W]hen the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, . . . considerations of the State's admonitory interest and party reliance are less important. Under those circumstances, the locus jurisdiction has at best a minimal interest in determining the right of recovery or the extent of the remedy in an action by a foreign domiciliary for injuries resulting from the conduct of a codomiciliary that was tortious under the laws of both jurisdictions Analysis then favors the jurisdiction of common domicile because of its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority.

Id.

3. Conduct-Regulation Issues

Based on the first of the above premises, section 2 of the Draft discounts the parties' domicile and focuses instead on the place of the injurious conduct and the place of the resulting injury as the contacts that are most relevant in conduct-regulation conflicts. If the above premise is accepted, then all possible conflicts will fit in one of two general patterns: the conduct and the injury may occur either: (1) in the same state, or (2) in different states. Cases of the second pattern can be further subdivided into cases in which the conduct-state prescribes: (a) the same; (b) a higher; or (c) a lower standard than the injury-state. These three subpatterns, as well as pattern 1, are shown below by using a capital letter to denote a state with a higher standard and a lower-case letter to denote a state with a lower standard of conduct.

Table 1. Conduct-Regulation Conflicts

Pattern		Conduct	Injury	Appl. Law
1	same state	X	X	X
2(a)	same standard	X	Y	X
2(b)	different	X (Higher)	y (lower)	X
2(c)		x (lower)	Y (Higher)	Y

The first subsection of Draft section 2 provides that cases of pattern 1 are to be resolved under the law of the conduct state. These are the cases for which the *Babcock* court said that "it would be almost unthinkable to seek the applicable rule in the law of some other place."⁸² If any confirmation of this elementary proposition were needed,⁸³ the case law is replete with examples of cases holding to that effect.⁸⁴

82. *Babcock*, 191 N.E.2d at 284.

83. See, e.g., Willis L.M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 13-14 (1977) (observing that with respect to the question whether the defendant's conduct was tortious, the "applicable law will, almost surely, be that of the state where the defendant acted if either (a) this law would [so] hold the conduct, or (b) the plaintiff's injury also occurred in the state"); see also SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, § 17.1.

84. For cases characterizing the issue at stake as one of conduct-regulation and applying to it the law of state of conduct and injury rather than the law of the parties' domicile, see, for example, *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999); *Gray v. Busch Entertainment Corp.*, 886 F.2d 14 (2nd Cir. 1989) (contributory negligence); *Schechter v. Tauck Tours, Inc.*, 17 F. Supp. 2d 255, (S.D.N.Y. 1998) (slip and fall case—tour guide's and park owner's standard of care); *Tkaczewski v. Ryder Truck Rental, Inc.*, 22 F. Supp. 2d 169 (S.D.N.Y. 1998) (negligent parking of car that contributed to causing an accident); *Richardson v. Michelin N. Am., Inc.*, No. 95-CV-0760E(H) 1998 WL 135804 (W.D.N.Y. Mar. 18, 1998) (strict liability); *Matson by Kehoe v. Anctil*, 979 F. Supp. 1031 (D. Vt. 1997) (contributory negligence of victim's parents); *Bauer v. Club Med Sales, Inc.*, No. C-95-1637 1996 WL 310076 (N.D. Cal. May 22, 1996) (premises liability); *Thompson v. IBM Corp.*, 862 F. Supp.

The second subsection of section 2 deals with the split-conduct-injury pattern and gives the injured party the right to request the application of the law of the injury-state in all three subpatterns. As a practical matter, such a request will be made only in cases of subpattern 2(c) in which the injury-state has a law more favorable to recovery than the conduct-state. In that case, the defendant is also given the right to object to the application of the law of the injury-state by showing that the occurrence of the injury in that state was not "objectively foreseeable."⁸⁵ Thus, under section 2, the law of the conduct-state will apply to all conduct-regulation conflicts, except those in which the injury foreseeably occurs in another state that provides a higher standard of conduct than the conduct-state.⁸⁶

It is submitted that these results can be defended under any choice-of-law theory, traditional or modern. Cases falling within pattern 2(a) in which the conduct-state and the injury-state adhere to the same standards present a "conflict" that, in interest analysis terminology, would be as "false" as that presented in pattern 1.⁸⁷

79 (S.D.N.Y. 1994) (scaffolding law); *District of Columbia v. Coleman*, 667 A.2d 811 (D.C. 1995) (contributory negligence and assumption of risk); *Moye v. Palma*, 622 A.2d 935 (N.J. Super. Ct. App. Div. 1993) (contributory negligence); *Augello v. 20166 Tenants Corp.*, 648 N.Y.S.2d 101 (N.Y. App. Div. 1996) (scaffolding law); *FCE Transp. Inc. v. Ajayem Lumber Midwest Corp.*, No. 87AP-1146, 1988 WL 48018 (Ohio Ct. App. May 12, 1988) (traffic rules); *Troxel v. A.I. duPont Inst.*, 636 A.2d 1179 (Pa. Super. Ct. 1994) (medical malpractice); *Ellis v. Parto*, 918 P.2d 540 (Wash. Ct. App. 1996), *review denied* 930 P.2d 1229 (Wash. 1997) (traffic rules).

For cases holding the forum's conduct-regulating rule inapplicable to an accident in another state and involving exclusively forum residents, see *Zangiacomi v. Saunders*, 714 F. Supp. 658 (S.D.N.Y. 1989); *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001 (N.Y. 1994); *Huston v. Hayden Bldg. Maintenance Corp.*, 617 N.Y.S.2d 335 (N.Y. App. Div. 1994); *Salsman v. Barden & Robeson Corp.*, 564 N.Y.S.2d 546 (N.Y. App. Div. 1990).

85. The quoted term should be understood as a shorthand expression that might benefit from further refinement. One such refinement might be to use language such as that contained in the Puerto Rican Draft Code of Private International Law which provides for the application of the law of the injury-state "if that state's contacts with the defendant's actual or intended course of conduct were such as to make foreseeable the occurrence of the injury in that state." SYMEONIDES & VON MEHREN, *supra* note 55, art. 46. For comparable language see Weintraub's proposed rule for tort conflicts in RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 360 (3d ed. 1986).

In any event, the foreseeability contemplated by Draft section 2 should not be confused with the foreseeability of substantive tort law, but should be understood in a "spatial" sense. The pertinent question here is not whether the tortfeasor should have foreseen the occurrence of the injury, but whether he should have foreseen that the injury would occur in the particular state in which the injury did occur. A good example of the foreseeability test is provided by *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), which held that the geographical proximity of Nevada defendant's tavern to the Nevada/California border should have alerted the defendant to the possibility that some of its customers who got drunk in its tavern might drive into California while still intoxicated and cause an accident there.

86. According to section 2 as presently drafted, those cases of pattern 2(c) in which the victim does not request the application of the law of the injury-state (or in which the defendant effectively invokes the foreseeability proviso) will be governed by that law of the conduct-state, subject to the escape of Draft section 6.

87. For cases involving this pattern, see, for example, *Pardey v. Boulevard Billiard Club*,

The same characterization can be given to cases of pattern 2(b) in which the tortfeasor's conduct violates the "higher" standard of the conduct-state but not the "lower" standard of the injury-state. In such a case, the application of the law of the conduct-state would promote the policy of that state in policing conduct within its borders, without subordinating whatever policies may be embodied in the law of the injury-state. The effectiveness of the conduct-regulating rule of the conduct-state would be seriously impaired if exceptions to it were made for out-of-state injuries. Such exceptions are not warranted by the fact that the injury-state happens to allow a lower standard, since that standard is designed to protect conduct within, not without, that state. Besides, there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of that state, the tortfeasor should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state. The application of the law of the conduct-state in such circumstances finds support in both the case law⁸⁸ and in academic commentary.⁸⁹

On the other hand, cases falling within pattern 2(c) in which the conduct in question does not violate the "lower" standards of the conduct-state but does violate the "higher" standards of the injury-state are likely to present the true conflict paradigm.

518 A.2d 1349 (R.I. 1986) (applying the Rhode Island dramshop act to an action by a Massachusetts plaintiff arising out of a Massachusetts accident caused by a driver who became intoxicated in defendant's Rhode Island tavern; Massachusetts had a dramshop act similar to Rhode Island's); *Rutledge v. Rockwells of Bedford, Inc.*, 613 N.Y.S.2d 179 (N.Y. App. Div. 1994) (applying New York's dramshop act to an action arising from a Connecticut accident caused by a driver who became intoxicated in defendant's New York tavern. Connecticut had a dramshop act similar to New York's. The court concluded that defendant's argument that the New York act should not apply "does not pass dialectical muster."); *Platano v. Norm's Castle, Inc.*, 830 F. Supp. 796 (S.D.N.Y. 1993) (same pattern same result on dramshop act liability, but awarding compensatory damages under Connecticut's more generous standards so as to better effectuate the deterrence policy embodied in New York's act). The court also observed that "respect for the national interests of interstate commerce . . . suggests that the rules in effect where the ultimate harm occurs should measure the monetary consequences that flow from disregard of risks by those irresponsibly providing liquor." *Id.* at 799.

88. *See, e.g., Gaither v. Myers* 404 F.2d 216 (D.C. Cir. 1968) (applying District of Columbia law to impose civil liability on a car owner whose car was stolen in the District of Columbia and was involved in a Maryland accident; the District of Columbia, but not Maryland, had a rule that required car owners to remove their keys from their vehicles when leaving them unattended); *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268 (D.C. 1987) (applying the District of Columbia's dramshop act to impose civil liability on a D.C. tavern owner whose intoxicated customer caused an accident in Maryland; Maryland did not have a dramshop act); *see also Platano*, 830 F. Supp. 796.

89. *See, e.g.,* Professor Cavers's third "principle of preference" which provides: "Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions." CAVERS, *supra* note 64, at 159. For an eloquent defense of this principle, *see id.* at 159-66.

On balance, the application of the law of the injury-state subject to the foreseeability proviso (and subject further to the escape of section 6) can be defended on the basis of both current judicial practice⁹⁰ and academic opinion.⁹¹ In fact, at least with regard to intentional torts, the application of the law of the injury-state derives additional support from the decisions of the United States Supreme Court endorsing the so-called "effects doctrine."⁹²

90. See, e.g., *Bernhard*, 546 P.2d 719 (allowing recovery under the dramshop act of California where the injury occurred and the victim was domiciled, even though the law of Nevada, where the defendant acted and was domiciled, would not impose civil liability.) The occurrence of the injury in California was foreseeable. See *id.* at 725; see also *supra* note 81; *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702 (N.D. Ill. 1989) (applying Indiana's dramshop act against an Illinois tavern owner for injury caused by one of his intoxicated patrons in Indiana); *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346 (E.D. Pa. 1993) (applying Pennsylvania's dramshop act against a New Jersey tavern owner for injury caused by one of his intoxicated patrons in Pennsylvania). "[T]he Defendant specifically targeted the Pennsylvania market and should, therefore, have expected and planned for possible suits under Pennsylvania law." *Id.* at 349; see also *Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896 (Iowa 1996) (applying Iowa's vehicle owner's liability statute to an action arising from an Arizona accident and involving Iowa parties; finding that one of the purposes of the Iowa statute was "to make vehicle owners responsible for the actions of others to whom they have entrusted their motor vehicles," *id.* at 899, and that to not apply this statute because the accident occurred in another state "would undermine the effectiveness of th[is] important statute," *id.* (quoting *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 856 (Mich. 1982))); *Burney v. P & V Holding Corp.*, 553 N.W.2d 657 (Mich. Ct. App. 1996) (applying Michigan's vehicle owner's liability statute to an action arising from an Alabama accident involving Michigan parties).

Michigan . . . has an interest in effectuating the purpose of Michigan's owners' liability statute . . . [which] is to place the risk of damage or injury on the person with ultimate control of the vehicle and thereby promote safety in transportation. . . . [and which] "cannot be fully effectuated unless the owners' liability statutes are given uniform application to residents of this state traveling outside of Michigan as well as persons within our state. . . . To enforce the owners' liability statutes on the basis of where the accident occurred would undermine the effectiveness of these important statutes."

Id. at 660 (final omission in original) (quoting *Sexton*, 320 N.W.2d at 854). *Burney* relied on *Sexton*, which had reached the same result in the same pattern.

For similar results in cases involving New York's similar liability statute, see *McKinney v. S & S Trucking, Inc.* 885 F. Supp. 105 (D.N.J. 1995); *Haggerty v. Cedeno*, 653 A.2d 1166 (N.J. Super. Ct. App. Div. 1995); *Farber v. Smolack*, 229 N.E.2d 36 (N.Y. 1967). However, several recent New York cases characterized the New York statute as a loss-distributing rule. See, e.g., *Aboud v. Budget Rent A Car Corp.*, 29 F. Supp. 2d 178 (S.D.N.Y. 1998); *Tkaczewski v. Ryder Truck Rental, Inc.*, 22 F. Supp. 2d 169 (S.D.N.Y. 1998); *Janssen v. Ryder Truck Rental, Inc.*, 667 N.Y.S.2d 369 (N.Y. App. Div. 1998).

91. For example, Professor Cavers's first "principle of preference" which provides in part that "[w]here the liability laws of the state of injury set a higher standard of conduct . . . than do the laws of the state where the person causing the injury has acted . . . the laws of the state of injury should determine the standard . . . applicable to the case." CAVERS, *supra* note 64, at 139 (emphasis omitted).

92. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that the

4. Loss-Distribution Issues

Section 3 applies to issues of loss distribution that arise out of conduct that is found to be wrongful under the law applicable pursuant to section 2. However, unlike section 2 (and also unlike the *Neumeier* Rules),⁹³ section 3 is deliberately elliptical in that it does not cover all possible patterns of loss-distribution conflicts but rather only those for which a relatively noncontroversial rule can be agreed upon. The remaining patterns are relegated to the flexible approach of section 1. The patterns that fall within the scope of section 3 are shown in Table 2, below. In this table, the letters *X* and *Y* represent the involved states. The use of a capital letter indicates that the state represented by that letter provides for higher recovery (e.g., unlimited compensatory damages, no tort immunity, etc.) than the state represented by a lower-case letter (e.g. limited compensatory damages, charitable, family, or other tort immunity, etc.). The three rows of Table 2 show the three patterns that fall within the scope of the three subsections, respectively, of section 3.

Table 2. Loss-Distribution Conflicts

#	Conduct	Injury	P's dom.	D's dom.	Appl. Law
1a	—	—	X	X	X
b	—	—	x	x	x
c	—	—	X	Y	X
d	—	—	x	y	x
2a	y	y	X	y	y
b	Y	Y	x	Y	Y
c	x	x	x	Y	x
d	X	X	X	y	X
3	—	X	X	—	X

Sherman Act applies to conduct which occurred outside the United States but which was intended to and did produce substantial effects in the United States).

93. See *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972) (enunciating three rules for guest-statute conflicts, which were later extended to all loss-distribution conflicts).

a. Pattern 1: Common-Domicile Cases

Pattern 1 encompasses all cases in which parties domiciled in one state are involved in a tort that occurred in another state. Subsection (a) of section 3 calls for the application of the law of the common domicile,⁹⁴ whether or not that law provides for a higher (subpattern 1a) or a lower (subpattern 1b) recovery than the law of the place of the tort. Furthermore, the same provision equates these cases with cases in which the parties are domiciled in different states which however have a law that provides a substantially identical remedy. See subpatterns 1c and 1d.

i. Pattern 1a: Common Domicile
in the Prorecovery State

The application of the law of the common domicile in cases of pattern 1a, the *Babcock* pattern, is by now so well-entrenched in American case law and academic doctrine as to make unnecessary a detailed defense here.⁹⁵ Here numbers alone can provide the best defense. The vast majority (thirty-two out of forty-one) of cases in which a state court of last resort decided to abandon the *lex loci delicti* rule involved situations in which the parties were domiciled in the same state and were involved in an accident in another state. All but one⁹⁶ of these cases applied the law of the common domicile.⁹⁷ Of these cases, twenty-five cases involved the *Babcock* pattern,

94. Whether the new restatement should use the concept of domicile or instead the concept of habitual residence is a question that deserves exploration by the drafters. Another question worthy of exploration is the appropriate connecting factor with regard to corporations or other juridical persons. For purposes of comparison, see LA. CIV. CODE ANN. art. 3518 (West 1999) (providing that a juridical person may be treated as a domiciliary of either the state of its formation or its principal place of business, which ever is more pertinent to the particular issue).

95. For a detailed defense of the common-domicile rule in cases of this pattern see *Symeonides*, *supra* note 76, at 715-21, and authorities discussed therein. See also Collins v. Trius, Inc., 663 A.2d 570 (Me. 1995) (“[O]ne incontestably valuable contribution of the choice-of-law revolution in the tort conflict field is the line of decisions applying common-domicile law.”); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 788-89 (1983) (concluding that the application of the law of the common domicile in loss-distribution conflicts is the “only unqualified success” of the American conflicts revolution and “probably . . . its most enduring contribution.”). For a comparative discussion of the common-domicile rule, see SYMEONIDES, PERDUE & VON MEHREN, *supra* note 4, at 272-74.

96. The only case that applied the law of the place of the injury while abandoning general adherence to the *lex loci delicti* rule was *Peters v. Peters*, 634 P.2d 586 (Haw. 1981). This case arose out of a Hawaii traffic accident in which a New York domiciliary was injured while riding in a rented car driven by her husband. Her suit against him and ultimately his insurer was barred by Hawaii’s interspousal immunity law but not by New York’s law. The court applied Hawaii law because the insurance policy which had been issued on the rental car in Hawaii had been written in contemplation of Hawaii immunity law.

97. See cases cited at *infra* notes 98-102, 194. In addition, many cases decided during the *lex loci delicti* era but in deviation of that rule, such as *Emery v. Emery*, 289 P.2d 218, 223 (Cal. 1955), and *Haumschild v. Continental Cas. Co.*, 95 N.W.2d 814 (Wis. 1959), also

that is, they were cases in which the law of the common-domicile state was more favorable to recovery than the law of the state of injury. All but one⁹⁸ of these cases applied the law of the common domicile in conflicts involving guest statutes,⁹⁹ interspousal¹⁰⁰ or intrafamily¹⁰¹ immunity, compensatory damages,¹⁰² and other similar conflicts¹⁰³ between loss-distribution rules. In addition, many cases decided after the particular court abandoned the traditional theory have also applied the law of the common domicile in cases of the *Babcock* pattern.¹⁰⁴

involved this pattern and can be seen, at least in retrospect, as providing support for a common-domicile rule.

98. See *Peters*, 634 P.2d 586.

99. In addition to *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), see *First Nat'l Bank v. Rostek*, 514 P.2d 314 (Colo. 1973) (Colorado parties, South Dakota accident, and guest statute); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980) (Florida parties, North Carolina accident, and guest statute); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967) (Kentucky parties, Indiana accident, and guest statute); *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970) (Maine parties, Massachusetts accident, and guest statute); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969) (Missouri parties, Indiana accident, and guest statute); *Clark v. Clark*, 222 A.2d 205 (N.H. 1966) (New Hampshire parties, Vermont accident, and guest statute); *Mellk v. Sarahson*, 229 A.2d 625 (N.J. 1967) (New Jersey parties, Ohio accident, and guest statute); *Woodward v. Stewart*, 243 A.2d 917 (R.I. 1968) (Rhode Island parties, Massachusetts accident, and guest statute); *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965) (Wisconsin parties, Nebraska accident, and guest statute).

100. See *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) (Alaska spouses, accident in Yukon territory); *Schwartz v. Schwartz*, 447 P.2d 254, 257 (Ariz. 1968) (New York spouses, Arizona accident); *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass. 1976) (Massachusetts spouses, New York accident); *Forsman v. Forsman*, 779 P.2d 218 (Utah 1989) (California spouses, Utah accident).

101. See *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973) (Louisiana parent and child, Mississippi accident); *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966) (Minnesota parent and child, Wisconsin accident).

102. See *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974) (Oklahoma parties, accident in Mexico); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979) (Texas parties, accident in Mexico); *Widow of Fornaris v. American Sur. Co.*, 93 P.R.R. 28 (1966) (Puerto Rico parties, accident in St. Thomas).

103. See *O'Connor v. O'Connor*, 519 A.2d 13 (Conn. 1986) (tort action versus administrative remedy, Connecticut parties, Quebec accident); *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del. 1991) (tort action versus administrative remedy, Delaware parties, Quebec accident and law limiting plaintiff to administrative remedy); *Myers v. Gaither*, 232 A.2d 577 (D.C. 1967) (accident in Virginia involving District of Columbia parties and a District rule which imposed liability on a car owner for leaving keys in ignition of unattended car—this rule could be categorized, at least in part, as a conduct-regulating rule); *Fabricious v. Horgen*, 132 N.W.2d 410 (Iowa 1965) (eligibility for wrongful death action, Iowa parties, Minnesota accident); *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982) (vehicle owner's liability law, Michigan parties, Virginia accident); *Mitchell v. Craft*, 211 So. 2d 509, 515 (Miss. 1968) (comparative negligence, Mississippi parties, Louisiana accident).

104. See, e.g., *Esser v. McIntire*, 661 N.E.2d 1138 (Ill. 1996) (applying Illinois's pro-recovery law to action between Illinois parties arising out of injury sustained during the parties' common vacation in Mexico); *Nelson v. Hix*, 522 N.E.2d 1214 (Ill. 1988) (applying Ontario's non-immunity rule, rather than Illinois's interspousal immunity rule, to action

ii. Pattern 1b: Common Domicile in the
Nonrecovery State

Cases falling within the reverse-*Babcock* pattern in which the parties are domiciled in a nonrecovery state and are involved in a tort in the pro-recovery state are less numerous. Nevertheless, in all seven cases of this pattern in which a state court of last resort was faced with the dilemma of whether to continue to apply the *lex loci delicti* rule or to abandon it, the court chose the latter option and applied the law of the common domicile.¹⁰⁵ With some notable exceptions such as *Milkovich v. Saari*,¹⁰⁶ the same result was reached by cases decided after the particular court abandoned the *lex loci* rule.¹⁰⁷ The “*Neumeier* rules”¹⁰⁸ and the Louisiana codification¹⁰⁹ have also opted

between Ontario spouses arising out of Illinois traffic accident), *cert. denied*, 488 U.S. 925 (1988); *Miller v. White*, 702 A.2d 392 (Vt. 1997) (applying Vermont’s pro-recovery law to a case arising out of Quebec accident involving Vermont parties).

105. See *Johnson v. Pischke*, 700 P.2d 19 (Idaho 1985) (Saskatchewan parties and worker’s compensation immunity, accident in Idaho); *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970) (Illinois parties and less favorable law on damages, accident in Iowa); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987) (Indiana parties and pro-manufacturer products liability law, injury in Illinois); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968) (Iowa parties and guest statute, accident in Wisconsin); *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972) (North Dakota parties and contributory negligence rule, accident in Minnesota); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992) (South Dakota parties and contributory negligence rule, accident in Missouri); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992) (Tennessee parties and contributory negligence rule, accident in Arkansas). In all but one of these cases (*Pischke*, 700 P.2d 19), the common domicile was in the forum state.

106. 203 N.W.2d 408 (Minn. 1973) (following a better-law approach and refusing to apply Ontario’s guest statute in a suit by an Ontario guest-passenger against his Ontario host-driver arising out of a traffic accident in Minnesota which did not have a guest statute); see also *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. Ct. App. 1968) (following a *lex fori* approach and applying Kentucky law to an action between Ohio spouses which would have been barred by both Ohio’s interspousal immunity rule and Ohio’s guest statute); *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968).

107. See, e.g., *Collins v. Trius, Inc.*, 663 A.2d 570 (Me. 1995) (applying Canadian law which did not allow recovery for pain and suffering to a case arising out of a Maine accident involving Canadian parties); *Lessard v. Clarke*, 736 A.2d 1226 (N.H. 1999) (applying Ontario’s pro-defendant law to a case arising out of a New Hampshire accident involving Ontario parties); *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985) (applying the charitable immunity rule of New Jersey, the state where the plaintiffs and one of the defendants were domiciled rather than the law of New York where the wrongful conduct occurred and which did not provide for charitable immunity); *Myers v. Langlois*, 721 A.2d 129 (Vt. 1998) (applying Quebec law and denying a tort action in a dispute between Quebec parties arising out of a Vermont accident).

108. *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972) (“When the guest-passenger and the host-driver are domiciled in the same state . . . the law of that state should control and determine the standard of care which the host owes to his guest.”). Although originally designed for guest-statute conflicts, this and the other *Neumeier* rules were extended by *Schultz* to all loss-distribution conflicts. *Schultz*, 480 N.E.2d at 679.

109. See LA. CIV. CODE ANN. art. 3544 (West 1999), discussed in Symeonides, *supra* note 76, at 715-31.

for the application of the law of the common domicile, and so does this Draft. It is believed that, if only for reasons of evenhandedness and intellectual consistency, the application of the law of the common domicile should not depend on whether that law favors or disfavors recovery. In defending this application, the *Schultz* court spoke not only of the advantages of administrability, "predictability and certainty,"¹¹⁰ and of discouraging forum shopping, but also about "rebut[ting] charges that the forum-locus is biased in favor of its own laws and in favor of rules permitting recovery."¹¹¹ The Court also based the rule on "concepts of mutuality and reciprocity."¹¹² Similarly the Supreme Court of Maine spoke of

a social contract notion, whereby a resident assents to casting her lot with others in accepting burdens as well as benefits of identification with a particular community, and ceding to its lawmaking agencies the authority to make judgments striking the balance between her private substantive interests and competing ones of other members of the community.¹¹³

At the same time, it should be recognized that cases of this pattern are more difficult than, for example, cases of the *Babcock* pattern. Here the fact that the law of the state of injury favors recovery arguably generates a certain interest on the part of that state in deterring wrongful conduct within its territory and in ensuring recovery of medical costs resulting from the tort. This interest does not necessarily trump, but it does rival to some extent, the interest of the common-domicile state in denying or reducing recovery. Thus, the very presence of an interest, even a weak one, on the part of the injury-state prevents the easy classification of these conflicts into the classic false-conflict paradigm. For this reason, unlike the *Neumeier* rules, the Draft recognizes the need for an escape in appropriate cases, perhaps in cases like *Schultz*.¹¹⁴ Section 6 of the Draft will perform this corrective role.¹¹⁵

110. *Schultz*, 480 N.E.2d at 97-98.

First, it significantly reduces forum-shopping opportunities, because the same law will be applied by the common-domicile and locus jurisdictions, the two most likely forums. Second, it rebuts charges that the forum-locus is biased in favor of its own laws and in favor of rules permitting recovery. Third, the concepts of mutuality and reciprocity support consistent application of the common-domicile law. In any given case, one person could be either plaintiff or defendant and one State could be either the parties' common domicile or the locus, and yet the applicable law would not change depending on their status. Finally, it produces a rule that is easy to apply and brings a modicum of predictability and certainty to an area of the law needing both.

Id.

111. *Id.*

112. *Id.*

113. *Collins v. Trius, Inc.*, 663 A.2d 570, 573 (Me. 1995).

114. *Schultz*, 480 N.E.2d at 679.

115. For a discussion of the *Schultz* case under the Louisiana choice-of-law rule which is similar to Draft section 3, *supra*, see Symeon C. Symeonides, *Resolving Six Celebrated Conflicts Cases Through Statutory Choice-of-Law Rules*, 48 MERCER L. REV. 837, 847-58 (1997).

iii. Patterns 1c and 1d: Fictitious Common Domicile

The Draft also takes the position that cases in which the parties are domiciled in different states that provide a “substantially identical” recovery are analytically analogous to common-domicile situations and should in principle be treated alike,¹¹⁶ subject always to the corrective mechanism of section 6. For example, if the plaintiff in *Babcock* was domiciled in a state that had the same law as New York (pattern 1c), the resulting conflict would be as false as *Babcock* and should be resolved the same way.¹¹⁷ The same could be said, though perhaps less categorically, about the converse situation in which a Quebec tortfeasor and an Ontario victim are involved in a New York accident. If Quebec had a guest statute similar to Ontario’s (pattern 1d), the resulting conflict would be analogous to that in pattern 1b and should be decided the same way.¹¹⁸

116. By treating these parties as if they were domiciled in the same state, section 3(a) is consciously employing a legal fiction that will alleviate the court’s choice-of-law burden by properly identifying and resolving as “false conflicts” a great number of cases, especially those involving multiple victims or multiple tortfeasors. For a statutory choice-of-law rule providing that such cases should be decided under the law of the domicile of either party (called “fictitious common domicile”), see LA CIV. CODE ANN. art. 3544 (West 1994), *discussed in* Symeonides, *supra* note 76, at 723-25.

117. For New York cases resolving conflicts of this pattern in the way described in the text, see, for example, *Reach v. Pearson*, 860 F. Supp. 141, (S.D.N.Y. 1994) (applying New York law to actions by New Jersey plaintiffs against New York defendants arising from Quebec accident; Quebec limited the amount of damages, whereas both New Jersey and New York provided for unlimited recovery); *Tkaczewski v. Ryder Truck Rental, Inc.*, 22 F. Supp. 2d 169 (S.D.N.Y. 1998) (applying New York law to action by New York plaintiff against a Florida defendant arising from accident in a third state; defendant car owner was liable under both New York and Florida law). For a California case, see *Bauer v. Club Med Sales, Inc.*, C-95-1637 MHP, 1996 WL 310076 (N.D. Cal. May 22, 1996) (applying California law to a wrongful death action by a California plaintiff against an “American” corporate defendant arising from a Mexico accident).

118. In *Diehl v. Ogorewac*, 836 F. Supp. 88 (E.D.N.Y. 1993), a New York plaintiff was injured in a North Carolina accident while riding as a passenger in a car driven by a New Jersey defendant. Although all three states required passengers to wear seat belts, North Carolina (unlike New York and New Jersey) prohibited the admission into evidence of a plaintiff’s failure to wear a seat belt. The court characterized the North Carolina rule as a “loss allocation” rule, *id.* at 92, and thus as falling within the scope of the *Neumeier* rules. The court recognized that *Neumeier* Rule 1 (the common domicile rule) was “facially inapplicable,” *id.* at 93, since the parties did not share a common domicile but concluded that “[t]he rationale underlying the first *Neumeier* rule counsels in favor of application of New York law,” *id.* The court reasoned that

since [the] parties have voluntarily aligned themselves with states that share a common perspective on this issue of law, neither can complain that this Court subjects them to the standard of care commensurate with the law of their respective domicile. Therefore, this court finds that application of New York law in the present instance fully comports with the policies served by the first *Neumeier* rule.

Id.

b. Pattern 2: Cases in Which Conduct and
Injury Occur in the Domicile of Either Party

Pattern 2 encompasses cases in which the parties are domiciled in different states that provide different remedies and in which *both* the conduct and the injury occurred in either the victim's or the tortfeasor's domicile. Subsection (b) of section 3 calls for the application of the law of that domiciliary state that has both of these additional contacts, whether that state is the domicile of the tortfeasor (subpatterns 2a and 2b) or of the victim (subpatterns 2c and 2d), and regardless of whether that law provides for a lower (subpatterns 2a and 2c) or for a higher (subpatterns 2b and 2d) recovery than the other involved state.

Under interest analysis terminology, subpatterns 2a and 2d represent the true conflict paradigm, while subpatterns 2b and 2c represent the no-interest or unprovided-for paradigm. It is submitted that the rule of section 3(b) (which can be characterized as "lex loci delicti et domicilii") is far more defensible than, for example, Brainerd Currie's "solution" of applying the law of the forum qua forum, or other, result-oriented formulae in which the plaintiff always wins.¹¹⁹

When, as in subpatterns 2a and 2b, a person engages in activity in his home state that causes injury in that state, the application of that state's law would not only preserve the loss-distribution equilibrium established by that law, but would also be consistent with that person's decision "to accept both the benefits and the burdens of identifying with that jurisdiction and to submit . . . to its authority."¹²⁰ In the absence of special circumstances, the fact that the injured person is domiciled in another state is simply not a good enough reason to change the equation.

In subpattern 2a, in which the conduct and the injury occurs in the tortfeasor's domicile whose law protects him, the injured person should not be heard to complain about the application of the law of that state. In the words of Professor Cavers, "[b]y entering the state or nation, the visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created."¹²¹ Cases involving this pattern and applying the pro-defendant

119. For a critique of modern approaches along these lines, see Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1602-11 (1985). Based on this critique, I would like to believe that Professor Hill would support the rule proposed in the text.

120. *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685 (N.Y. 1985) (footnote omitted).

121. CAVERS, *supra* note 64, at 147. The statement quoted in the text was advanced in support of Cavers's second principle of preference which provides in part that "[w]here the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case." *Id.* at 146. In discussing the operation of this principle, Cavers used a hypothetical case in which a New York resident is killed in a Massachusetts traffic accident caused by the negligence of Massachusetts resident. Cavers concluded that in such a case, the Massachusetts limitation on the amount of recoverable damages should apply because "[i]nhabitants of Massachusetts should not be put in jeopardy of liabilities exceeding those which Massachusetts law creates simply because persons from states with higher standards of financial protection choose to visit there." *Id.* at 148-49.

law of the defendant-affiliated state, which was also the locus delicti (rather than the pro-recovery law of the victim's domicile), are indeed numerous. In addition to the well-known case *Cipolla v. Shaposka*,¹²² they include cases decided under the *Second Restatement*,¹²³ interest analysis,¹²⁴ the lex fori approach,¹²⁵ the better-law approach,¹²⁶ the *Neumeier* rules,¹²⁷ or another mixed approach.¹²⁸

For example, in contrast to the much criticized New York case of *Rosenthal v. Warren*,¹²⁹ a Pennsylvania medical malpractice case applied the pro-defendant law of Delaware, the state in which the medical services had been rendered,¹³⁰ despite the claim that the defendant health care provider had solicited patients from the victim's home state of Pennsylvania.¹³¹ The court recognized Pennsylvania's interest in protecting its citizens but concluded that "that interest is superseded by Delaware's interest in regulating the delivery of health care services in Delaware"¹³² and in

122. 267 A.2d 854 (Pa. 1970) (involving a guest statute conflict).

123. See, e.g., *Bowman v. Koch Transfer Co.*, 862 F.2d 1257, 1259 (6th Cir. 1988) (limitations to amount of compensatory damages); *McBride v. Whiting-Turner Contracting Co.*, 1993 WL 489487 (Del. Super. Ct. Oct. 21, 1993) (worker's compensation immunity from tort suit), *aff'd*, 645 A.2d 568 (Del. 1994); *Marion Power Co. v. Hargis*, 698 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1997) (same); *Casey v. Manson Constr. & Eng'g Co.*, 428 P.2d 898, 900 (Or. 1967) (loss of consortium).

124. See, e.g., *Bledsoe v. Crowley*, 849 F.2d 639, 641-43 (D.C. Cir. 1988) (medical malpractice, damages limitations, medical review requirement); *Eger v. E.I. du Pont DeNemours Co.*, 539 A.2d 1213 (N.J. 1988) (worker's compensation immunity from tort suit).

125. See *Motenko v. MGM Dist., Inc.*, 921 P.2d 933 (Nev. 1996) (loss of parental consortium).

126. See, e.g., *Benoit v. Test Sys., Inc.*, 694 A.2d 992, 995-96 (N.H. 1997) (worker's compensation immunity from tort suit).

127. See, e.g., *Bankers Trust Co. v. Lee Keeling & Assocs.*, 20 F.3d 1092 (10th Cir. 1994) (professional malpractice); *Barkan v. General Admin.*, 923 F.2d 957, 963 (2d Cir. 1991) (caps on compensatory damages); *Bader v. Purdom*, 841 F.2d 38 (2d Cir. 1988) (contribution and indemnification between joint tortfeasors); *Miller v. Bombardier, Inc.*, 872 F. Supp. 114 (S.D.N.Y. 1995) (loss of consortium); *Mascarella v. Brown*, 813 F. Supp. 1015, 1019 (S.D.N.Y. 1993) (contribution and indemnification between joint tortfeasors); *Venturini v. Worldwide Marble & Granite Co.*, No. 94 Civ. 4435, 1995 WL 606281 (S.D.N.Y. Oct. 13, 1995) (same); *Pascente v. Pascente*, No. 91 Civ. 8104, 1993 WL 43502 (S.D.N.Y. Feb. 16, 1993) (contributory negligence); *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477 (N.Y. Sup. Ct. 1987) (limitations to amount of compensatory damages).

128. See, e.g., *Shuder v. McDonald's Corp.*, 859 F.2d 266, 269-73 (3d Cir. 1988) (contributory negligence); *Troxel v. A.I. duPont Inst.*, 636 A.2d 1179 (Pa. Super. Ct. 1994) (medical malpractice).

129. 475 F.2d 438 (2d Cir. 1973).

130. See *Troxel*, 636 A.2d 1179. In this case, the injury had been suffered in Pennsylvania where plaintiff, who at the time was pregnant, had contracted a contagious disease from a friend, Mary Siple, and Mary's infant, both of whom were being treated in defendant's Delaware hospital, upon referral from a Pennsylvania doctor. As a result of that disease, plaintiff lost her child, who was infected with the same disease while in utero. Plaintiff sued the Delaware hospital for its failure to inform Mary Siple of the contagious nature of her disease and of the risk to pregnant women who might come into contact with her infant.

131. See *id.* at 1182.

132. *Id.* at 1181.

protecting defendants who acted in that state.¹³³ The court said that “the qualitative contacts of Delaware were greater and more significant than those of Pennsylvania,”¹³⁴ and that when acting in Delaware, defendant was “entitled to rely on the duties and protections provided by Delaware law.”¹³⁵ The court also said that any rule that would allow patients to carry with them the protective law of their domicile “when [they] travel . . . to Delaware to obtain medical care . . . would be wholly unreasonable, for it would require hospitals and physicians to be aware of and be bound by the laws of all states from which patients came to them for treatment.”¹³⁶ Another medical malpractice case reached the same result after concluding that the state where the medical services were rendered was the “jurisdiction with the stronger interests.”¹³⁷ A concurring judge would elevate this result to the status of a choice-of-law *rule* that would apply the law of the state where the medical services are rendered. After pointing out that “patients are inherently on notice that journeying to new jurisdictions may expose them to [unfavorable] rules,”¹³⁸ the judge concluded that “[t]he maxim ‘When in Rome do as Romans do’ bespeaks the common sense view that it is the traveler who must adjust.”¹³⁹

Likewise, in cases falling within pattern 2b, in which the conduct and injury occurs at the tortfeasor’s domicile that has a law more favorable to recovery than the victim’s domicile, the tortfeasor should not be heard to complain about the application of the law of the state where he is domiciled and where he also acted and caused the injury.

133. *See id.*

[I]nsofar as the instant claim is focused upon [defendants] because of services rendered to a Pennsylvania resident in Delaware by a Delaware health care provider, the State of Delaware has the greater interest in the application of its law. . . . In treating [the patient] . . . the hospital was required to follow and abide by the laws of Delaware. As such, [defendants] were entitled to rely on the duties and protections provided by Delaware law.

Id.

134. *Id.* at 1182.

135. *Id.* at 1181.

136. *Id.*

Pennsylvania law did not follow [the patient] when [she] traveled to Delaware to obtain medical care. Any other rule would be wholly unreasonable, for it would require hospitals and physicians to be aware of and be bound by the laws of all states from which patients came to them for treatment. This is not the law.

Id.

137. *Bledsoe v. Crowley*, 849 F.2d 639, 641 (D.C. Cir. 1988) (citing *Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984)). In this case the alleged malpractice occurred in Maryland, a state that requires compulsory arbitration before a medical malpractice claim can be pursued judicially. Without resorting to arbitration, the plaintiff, a District of Columbia resident, filed his medical malpractice suit in the District. *See id.* at 640. Employing interest analysis, the court held that Maryland law was applicable to the medical malpractice action, including Maryland’s requirement for prior arbitration. The court specifically rejected plaintiff’s argument that the arbitration requirement could not have extraterritorial effect, and remanded the case to the district court with instructions to stay proceedings until arbitration was conducted in Maryland. *See id.* at 644, 646.

138. *Id.* at 647 (Williams, J., concurring).

139. *Id.*

Under the assumptions and terminology of interest analysis, these cases may be characterized as presenting the "unprovided-for" or "no-interest" paradigm, although, as *Hurtado v. Superior Court*¹⁴⁰ illustrates, they can also be classified as false conflicts if one concludes that the pro-recovery law of the state of conduct and injury is motivated at least in part by a policy of deterrence.¹⁴¹

Similar considerations should prevail in cases falling within subpatterns 2d and 2c, *supra*. In pattern 2d, a person injured in his home state by conduct in that state should be entitled to the protection of the law of that state, whether or not the person who caused the injury is from another state that provides for a lower standard of protection. Again using Cavers's words, "the defendant who is held to the higher standard [of the state of injury] is not an apt subject for judicial solicitude. He cannot claim to enjoy whatever benefits a state may offer to those who enter its bounds and at the same time claim exception from its burdens."¹⁴² In fact many courts have taken this position even vis-à-vis defendants who have not physically "entered" the bounds of that state but have caused injury therein through contact undertaken elsewhere.¹⁴³ Finally, an

140. 522 P.2d 666 (Cal. 1974) (wrongful death damages; applying the pro-recovery law of California which was the place of conduct, injury, and defendant's domicile, rather than the law of the victim's domicile which limited the amount of recoverable damages); *see also* Villaman v. Schee, Nos. 92-15490, 92-15562, 1994 WL 6661 (9th Cir. Jan. 10, 1994) (same issue, same result).

141. Relying on this interest, the California Supreme Court classified *Hurtado* as a false conflict in which California was interested in securing compliance with its law. *See Hurtado*, 522 P.2d at 669.

142. CAVERS, *supra* note 64, at 141; *see also id.* at 141-42.

[T]he fact that [the defendant] would be held to a lower standard of care or of damages back in the state where he had his home . . . or, indeed, the fact that he enjoyed an immunity there, all would ordinarily seem matters of little consequence to the state of the injury. . . .

....

. . . Californians should not be put in jeopardy in California simply because an Arizonian . . . had come into California from a state whose law provides a lower standard of financial protection than does California's.

Id. at 140, 142. Cavers compresses the above into his Principle #1 which provides in part that "[w]here the liability laws of the state of injury set a higher standard . . . of financial protection against injury than do the laws of the state where the person causing the injury . . . had his home, the laws of the state of injury should determine the standard and the protection applicable to the case." *Id.* at 139.

143. *See, e.g.,* Bankers Trust Co. v. Lee Keeling & Assocs., Inc., 20 F.3d 1092 (10th Cir. 1994) (applying New York law to a case arising out of injury in New York sustained by a New York plaintiff and caused by the conduct of an Oklahoma defendant in Oklahoma); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593 (E.D. La. 1998) (applying Florida law to a products liability case and noting Florida's strong interest in applying its law to protect its citizens from building materials which were sold and used in that state and which could not withstand that state's extreme weather conditions); *Caruolo v. A C & S, Inc.*, No. 93 Civ. 3752 RWS, 1998 WL 730331 (S.D.N.Y. Oct. 16, 1998) (asbestosis case applying Rhode Island's pro-recovery law to a loss of consortium action brought by a Rhode Island plaintiff who was injured in that state); *Kramer v. Showa Denko K.K.*, 929 F. Supp. 733 (S.D.N.Y. 1996) (products liability case erroneously applying the *Neumeier* rules to a punitive damages conflict; awarding punitive damages under New York law to a New York victim

analogous rationale can be employed *against* the injured person in cases of pattern 2c (the *Neumeier* pattern).¹⁴⁴ Being injured in his home state by conduct in that state, the injured person should not be allowed to "claim exemption from the burdens"¹⁴⁵ of that state's law.¹⁴⁶

c. Pattern 3: Split-Domicile and Split-Conduct-Injury Cases

This then leaves all the cases in which neither the parties' domicile nor the conduct and injury are in the same state. Of these cases, subsection (c) of section 3 singles out only those cases in which the injury predictably occurs in the victim's domicile and authorizes the application of that state's law if the victim so requests. Again, as a practical matter, such a request is likely to be made only when that state provides for a higher recovery than the other involved state or states.¹⁴⁷ Again, the apparently pro-plaintiff tilt of this rule is mitigated by the foreseeability proviso that is made available to the defendant. Within these parameters, the application of the law of the injury-state finds ample support in both the case law¹⁴⁸ and in reputable academic doctrine.¹⁴⁹

injured in that state by a product manufactured in Japan by a Japanese corporation); *Bombardier Capital, Inc. v. Richfield Housing Ctr., Inc.*, Nos. 91-CV-750, 91-CV-502, 1994 WL 118294 (N.D.N.Y. Mar. 21, 1994) (applying Vermont law to an action brought by a Massachusetts/Vermont corporation against New York defendants for fraud in the inducement of a contract); *Hoover v. Recreation Equip. Corp.*, 792 F. Supp. 1484 (N.D. Ohio 1991) (applying Ohio to both products liability and successor liability claims by an Ohio resident injured in that state by a slide manufactured in Indiana by an Indiana corporation which was acquired by another Indiana corporation; concluding that Ohio had both a closer relationship and a greater interest than did Indiana); *Monroe v. Numed, Inc.*, 680 N.Y.S.2d 707 (N.Y. App. Div. 1998) (applying Florida law to a loss-of-consortium action arising out of the death of a Florida child whose death during surgery in Florida was attributed to a defective medical device manufactured in New York by a New York defendant; Florida, but not New York, allowed an action for loss of consortium).

144. *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972) (applying the defendant-protecting guest-statute of Ontario, where the conduct and injury occurred and the guest-passenger was domiciled, rather than the law of New York where the defendant host-driver was domiciled).

145. *CAVERS*, *supra* note 64, at 141.

146. For cases applying the defendant-protecting law of the victim's domicile which was also the place of conduct and injury, see, for example, *Buglioli v. Enterprise Rent-A-Car*, 811 F. Supp. 105 (E.D.N.Y. 1993) (rental company's liability); *Stutsman v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 546 A.2d 367 (D.C. 1988) (loss of consortium); *Benoit v. Test Sys., Inc.*, 694 A.2d 992 (N.H. 1997) (worker's compensation statutory immunity); *Reale v. Herco, Inc.*, 589 N.Y.S.2d 502 (N.Y. App. Div. 1992) (contribution among tortfeasors), *aff'd without opinion*, 999 F.2d 536 (2d Cir. 1993); *LaForge v. Normandin*, 551 N.Y.S.2d 142 (N.Y. App. Div. 1990) (no-fault statutory immunity; contribution among tortfeasors); *Vizcarra v. Roldan*, 925 S.W.2d 89 (Tex. App. 1996) (compensatory damages).

147. If the plaintiff does not request application of the law of the injury-state, then the case will fall under section 1, the residual section. Under that section, the court may choose to apply the law of the state of injury despite the plaintiff's failure to request its application, or the court may choose the law of another involved state.

148. For cases applying the pro-recovery law of the victim's domicile when the injury predictably occurred there as a result of conduct in another state, see, for example, *Kuehn v. Childrens Hosp.*, 119 F.3d 1296 (7th Cir. 1997) (survival action); *Bankers Trust Co.*, 20 F.3d

What is equally significant is that, unlike the *Neumeier* rules which subject all the other split-domicile split-conduct-injury cases to a presumptive *lex loci delicti* rule, section 3 of the Draft refers these remaining cases to the flexible approach of section 1. The judicial application of that section will in time yield more “precise” choice-of-law rules.

d. Comparison with *Neumeier* Rules

As the above discussion indicates, Draft section 3 differs in significant respects from the *Neumeier* rules.¹⁵⁰ These differences are listed below:

(1) The common-domicile rule of section 3 is broader than *Neumeier* Rule 1¹⁵¹ in that it also encompasses the “fictitious common-domicile” cases described *supra*.¹⁵²

(2) Unlike *Neumeier* Rule 1, the common-domicile rule of section 3(a), as well as the entire section 3, is subject to an escape (see section 6) which can prove useful in cases such as *Schultz*.

(3) The rule of subsection (b) of section 3 provides that the law of the tortfeasor’s domicile applies only if *both* the conduct and the injury occurred in that state, and that the law of the victim’s domicile applies only if *both* the conduct and the injury occurred in that state. In contrast, in *Neumeier* rule 2 this requirement is merely implicit and is derived from the fact that the rule was designed for traffic

1092 (professional malpractice); *David B. Lilly Co. v. Fisher*, 18 F.3d 1112 (3d Cir. 1994) (legal malpractice); *Caruolo*, 1998 WL 730331 (loss of consortium); *Monroe*, 680 N.Y.S.2d 707 (loss of parental consortium); *Performance Motorcars of Westchester, Inc. v. KPMG Peat Marwick*, 643 A.2d 39 (N.J. Super. Ct. App. Div. 1994) (accountant’s malpractice).

149. In defending this result, Professor Cavers argued:

Th[e] system of physical and financial protection [of the state of injury] would be impaired . . . if actions outside the state but having foreseeable effects within it were not also subject to its law. . . . If the state’s plan of financial protection for the victims of violations of its standards includes the civil liability of the violator, the fact that he would be held to a lower standard of care or of damages back in the state where he . . . [acted] or, indeed, the fact that he enjoyed an immunity there, all would ordinarily seem matters of little consequence to the state of the injury. . . .

....

. . . If he has not entered the state but has caused harm within it by his act outside it, then, save perhaps where the physical or legal consequences of his action were not foreseeable, it is equally fair to hold him to the standards of the state into which he sent whatever harmful agent, animal, object, or message caused the injury.

CAVERS, *supra* note 64, at 140, 141.

150. For an extensive discussion of the application of the *Neumeier* rules by New York courts after *Schultz*, see Symeonides, *A View “From the Trenches”*, *supra* note 78, at 4-18. For a detailed comparison of the *Neumeier* rules with the Louisiana codification and Professor Cavers’s principles of preference, see SYMEONIDES, PERDUE & VON MEHREN, *supra* note 4, at 269-82.

151. *Neumeier* rule 1 is reproduced at *supra* note 108.

152. See *supra* text accompanying notes 116-18.

accidents in which the driver's conduct and the resulting injury usually occur in the same state. However, the text of the *Neumeier* rule fails to make that point clear and in fact might lead to contrary inferences. Rule 2a speaks of a defendant acting in his own state and causing injury to a person domiciled in another state,¹⁵³ while Rule 2b speaks of a person being injured in her home state by a defendant domiciled in another state.¹⁵⁴ This language, which is innocuous when the *Neumeier* rules are applied to traffic accidents, becomes problematic when these rules are applied to torts in which the conduct and the injury occur in different states. For example, in a case in which the plaintiff is injured in her home state, whose law protects her, as a result of conduct undertaken by the defendant in his home state, whose law protects him, *Neumeier* Rules 2a and 2b conflict with each other.¹⁵⁵ This problem, which has been discussed in detail elsewhere,¹⁵⁶ is avoided by subsections (b) and (c) of Draft section 3.

(4) Finally, unlike *Neumeier* Rule 3 which is an all-encompassing rule that covers *all* loss-distribution conflicts other than those covered by Rules 1 and 2, the rule of subsection (c) of Draft section 3 is phrased in very narrow terms which cover only a small fraction of cases.¹⁵⁷ The remaining split-domicile split-conduct-injury cases are referred to the flexible approach of section 1, without any presumption in favor of the *lex loci delicti*.

153. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457-58. *Neumeier* Rule 2a provides as follows:

When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile.

Id.

154. See *id.* at 458. *Neumeier* Rule 2b provides: "Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense." *Id.*

155. *Id.* If the place of conduct is deemed to be the locus of the tort, the case is covered by Rule 2a which calls for the application of the law that protects the defendant. If the place of the injury is deemed to be the locus of the tort, the case is covered by Rule 2b which, "in the absence of special circumstances," *id.*, calls for the application of the law that protects the plaintiff. *Id.*

Similarly, if in the same case the conduct occurred in a third state, a conflict arises between Rule 2b and Rule 3. Again, if the locus of the tort is deemed to be in the state of injury and the victim's domicile, then Rule 2b applies and protects the victim. If the locus of the tort is deemed to be in the state of conduct, then Rule 2b becomes inapplicable. The case then falls within the residual Rule 3 which, subject to the escape specified therein, calls for the application of the law of the locus of the tort.

156. See SYMEONIDES, PERDUE & VON MEHREN, *supra* note 4, at 258-59, 276-77; Symeonides, *A View "From the Trenches"*, *supra* note 78, at 12-16.

157. See *supra* text accompanying notes 146-48.

5. Punitive Damages

Rules imposing punitive damages are par excellence conduct-regulating rules and thus conflicts between such rules could well be resolved under section 2. However, because section 2 might be considered as being tilted towards the plaintiff, it is preferable to provide a more evenhanded choice-of-law rule. Section 4 of the above Draft attempts to provide such a rule. This rule is built upon three factual contacts: place of conduct, place of the defendant's domicile, and place of injury.¹⁵⁸ It provides that punitive damages may be awarded when the particular conduct is such as to evoke punitive damages under the substantive laws of all three, or any two, of these states, or by the substantive law of a state that has all three or any two of the above contacts.

The operation of this rule is illustrated by Table 3, which portrays all possible fact-law patterns and, in the fourth column, indicates the result that would be reached under section 4. In the first four columns the word "Yes" means that the state with the contact appearing at the top of the column allows the recovery of punitive damages for the conduct in question, while the word "no" means that that particular state does not allow the recovery of such damages.

Table 3: Punitive-Damages Conflicts

#	Conduct	Injury	Def's dom.	Result
1	Yes	Yes	Yes	Yes
2	Yes	Yes	no	Yes
3	Yes	no	Yes	Yes
4	no	Yes	Yes	Yes
5	no	no	Yes	no
6	no	Yes	no	no
7	Yes	no	no	no
8	no	no	no	no

Unlike the rules contained in sections 2 and 3 of the above Draft, the rule of section 4 is not derived from the holdings of actual cases. Although one might argue that it reflects the *results* reached in many cases, one might also argue that the majority of cases are more liberal towards punitive damages in that they award such damages even if only one of the contact-states listed in section 4 would impose such damages.

158. The domicile of the victim is not a relevant contact because punitive damages are not intended for the protection of the individual victim (who, *ex hypothesi*, has been compensated for his loss through ordinary damages), but are rather designed to "punish" the individual tortfeasor, to deter him and other potential tortfeasors in the future, and to protect victims only indirectly. In contrast, the state of the tortfeasor's domicile must have a say on whether the tortfeasor is to be punished (or not punished/protected) and, if so, to what degree, and on whether similarly situated potential tortfeasors should be deterred. Similarly, the state of the tortfeasor's conduct has the equally obvious right and interest in regulating (policing, punishing, deterring, or encouraging) conduct within its borders. Finally, as the state that bears many of the consequences of such conduct, the state where the injury occurred has a legitimate claim to determine the legal consequences of such conduct.

Ordinarily, this variation should be defended here. However, in light of the space limitations of this *Journal*, the reader is kindly referred to a detailed defense of this rule that has been made elsewhere.¹⁵⁹

6. Products Liability Conflicts

Section 5 of the above Draft addresses products liability conflicts. It abandons the issue-by-issue analysis required by sections 2-4 for other tort conflicts and provides a mechanism for selecting the law applicable to the entirety of a products case, that is, both for questions of liability and for questions of damages, compensatory and punitive. The mechanism is to allow the victim to choose the applicable law while limiting to some extent the parameters of that choice. One limitation to the victim's choice is that the chosen state must have at least two of the factual contacts listed in section 5(1).¹⁶⁰ The other limitation is that the victim's choice will be disregarded upon a showing that the defendant's products were not available in the chosen state through ordinary commercial channels. In such a case, the victim may choose one of the other combinations provided by section 5(1), if such a combination is available.

If a choice is available to the plaintiff under subsection 1 but the plaintiff fails to make a choice, then the defendant is given a choice, albeit a more limited one. The defendant may only choose the law of the victim's domicile, and only if that state is also the place of the injury. The operation of section 5 is shown in Table 4.

159. See Symeonides, *supra* note 76, at 735-49 (defending the similarly phrased article 3546 of the Louisiana Civil Code); see also SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, §17.50.

160. The second sentence of section 5(1) permits the choice of a state that has only one of the five contacts listed in the first sentence but only upon a showing that at least one of the other four contact-states has a law that is "substantially identical" to the law of the chosen state. Even so, this sentence expands considerably the plaintiff's choices (see the letters in parentheses in Table 4, *infra*). Because this expansion might be found objectionable by many people, this sentence is placed in brackets. The brackets indicate that this sentence is not essential to the thrust of section 5 and that it needs to be thought through before being included in the text.

Table 4. Products-Liability Conflicts

	#	V's dom.	Injury	Acquis.	Mnfg.	D's dom.
Victim's choice	1	X	X(Y)			
	2	X		X(Y)		
	3	X			X(Y)	
	4	X				X(Y)
	5		X	X(Y)		
	6		X		X(Y)	
	7		X			X(Y)
	8			X	X(Y)	
	9			X		X(Y)
	10				X	X(Y)
D's choice	11	x	x			

There will, of course, be many cases which cannot be or are not disposed of under either subsection 1 or subsection 2, either because the requisite combination of contacts for a choice by the parties is lacking or because the parties do not avail themselves of an available choice. These cases are relegated to sections 2-4, or more precisely to section 2 with regard to conduct-regulation issues, to section 3 with regard to loss-distribution issues, and to section 4 with regard to punitive damages issues, if any.

Again, section 5 does not purport to reflect the theory or practice followed by American courts in products liability conflicts, although one might argue that in many cases it would produce results consistent with that practice.¹⁶¹ The inspiration for the rule of section 5 is derived from similar but not identical rules proposed some time ago by Professors Cavers¹⁶² and Weintraub¹⁶³ as well as by similar rules contained in some recent continental codifications.¹⁶⁴ Both Cavers and Weintraub defend their proposals¹⁶⁵ much more eloquently than I could ever hope to do here.

I do believe, however, that the basic advantage of a rule like that of section 5 is one of simplicity and administrability. Products liability conflicts are inherently complex

161. For a through discussion of products liability conflicts in the last two decades, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, at §§ 17.64-.76.

162. See David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703 (1977).

163. See Russell J. Weintraub, *A Proposed Choice-of Law Standard for International Products Liability Disputes*, 16 BROOK. J. INT'L L. 225 (1990); Russell J. Weintraub, *Methods For Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129 (1989); see also P. John Kozyris, *Values and Methods in Choice of Law For Products Liability: A Comparative Comment on Statutory Solutions*, 38 AM. J. COMP. L. 475 (1990).

164. See, e.g., article 137 of Swiss Federal Statute of December 18, 1987, on Private International Law; Hague Convention on the Law Applicable to Products Liability, Oct. 2, 1973, art. 4-8, 1056 U.N.T.S. 187, 193. For comparative discussion, see SYMEONIDES, PERDUE & VON MEHREN, *supra* note 4, at 315-18; SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 13, at §§ 17.74-.76.

165. See *supra* notes 162-63.

cases and, ironically, the more complex a case is the more appealing a *simple* choice-of-law rule for handling such conflicts becomes. For example, the above rule obviates the need to identify the critical conduct (e.g., design, testing, approval, assembly) that caused the injury and to fix the location of that conduct. Secondly, by letting the parties choose the applicable law, this rule obviates the need for a laborious judicial inquiry into the policies and interests of the many states that may be involved in the conflict. Finally, although it gives the plaintiff considerably more choices than it gives the defendant, section 5 is not as unfair to the defendant as it might appear at first sight. The plaintiff is given a choice of a state or states affiliated with either the defendant (defendant's domicile or place of manufacture) or the plaintiff (plaintiff's domicile or place of injury or place of acquisition). If the plaintiff chooses a state affiliated with the defendant, the defendant can hardly complain. If the plaintiff chooses a state affiliated with the plaintiff, the defendant can invoke the defense of the second subsection of section 5 and defeat the application of the law chosen by the plaintiff upon satisfying the conditions specified in that subsection.

7. The Escape

Draft section 6 provides the indispensable escape from any and all the rules contained in sections 2-5. Although there is little disagreement about the need for such a safety valve,¹⁶⁶ there is ample room for disagreement about its precise scope and phrasing. Such disagreements, however, are relatively minor and can be addressed during the drafting process.

IV. CONCLUDING THOUGHTS

In this Article, I have tried to explain why I believe that the *Second Restatement* should be replaced with a new restatement. I have also tried to offer some suggestions for rules that might be included in the new restatement's chapter on torts. These rules are narrow, issue-oriented rules that take account of the content of the conflicting substantive laws, either directly or by giving the affected parties a choice under appropriate circumstances. They do not cover the entire spectrum of tort conflicts but only those cases or issues for which our experience permits the articulation of safe, relatively uncontroversial rules. Even so, these rules provide an appropriate degree of flexibility because, although they themselves designate the applicable law in a straight forward fashion, they are accompanied by an escape clause which permits the court to deviate from them in exceptional cases. Cases or issues not covered by the proposed specific rules will continue to be handled under a general formula similar to that contained in sections 6 and 145 of the *Second Restatement* until a better substitute is agreed upon.

As I said earlier, I do not in any way harbor the belief that the rules proposed here are perfect, or even fully cooked. Nor do I necessarily expect a quick or slow consensus on either the style of or the specific choices made by these rules. However, I hope that I have illustrated that modern, sound choice-of-law rules are feasible if we collectively devote to the task the necessary attention and energy.

166. See *supra* note 76.